United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1250

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In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

JOSEPH C. VISPI,

Defendant-Appellant.

Appeal From Orders and Judgment of the United States District Court for the Western District of New York

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BRIEF FOR DEFENDANT-APPELLANT

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2. Whether the pre-prosecution delay constitutes a deprivation of due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. Whether the post information delay denied the defendant his right to a speedy trial, violated Rule 48(b) of the Federal Rules of Criminal Procedure, the Second Circuit Rules, and/or the Plan of the Western District for Prompt Disposition of Criminal Cases.

4. Whether the evidence was sufficient to support a judgment of conviction.

5. Whether the findings of facts of the trial court were adequate.

STATEMENT OF THE CASE

A. Nature of the Case

On October 23 and October 24, 1975, this case was heard by Hon. Harold P. Burke, United States District Judge for the Western District of New York, after the defendant, Joseph C. Vispi and his trial counsel had executed a waiver of his right to a trial by jury.

This is an appeal from various orders of Hon. Harold P. Burke, United States District Judge, and the Judgment of Conviction, as follows:

1. Order denying defendant's Motion to Dismiss the Information, dated October 17, 1975.
2. Judgment of Conviction filed May 19, 1976.
3. Order denying defendant's Motion to Vacate Conviction and for a New Trial, dated May 3, 1976.

B. Statement of Relevant Facts

In April, 1969, the Internal Revenue Service commenced an audit of the 1965-66 income tax returns of the defendant, Joseph C. Vispi. During the course of this audit and no later than September, 1969, the revenue agent became aware that the defendant had not yet filed his income tax returns for the years 1967 and 1968. The filing of these income tax returns was discussed at the various conferences with Revenue Agent Pardi. The activity log of the agent which consists of his transcribed notes contains the following entries:

1. September 24, 1969 - "...Need '67 and '68 return-gave one more week." (A-372)

2. October 17, 1969 - "...Per telephone, needs more time for '67 and '68." (A-372)

On October 23, 1969 Revenue Agent Pardi, concluded his audit of the defendant's 1965-66 income tax returns. The matter of the failure of the defendant to file his 1967 and 1968 income tax returns was referred to the Intelligence Division of the Internal Revenue Service for a criminal investigation. Less than three months thereafter, the defendant filed his 1967 and 1968 income tax returns. A protracted and detailed investigation by Special Agent Pasquarella of the Intelligence Division of the Internal Revenue Service was conducted and terminated in November, 1970. No evidence of any willful attempt in any manner to evade

or defeat any tax was uncovered. Amended 1967 and 1968 returns, with a re-allocation of income, were accepted and the Special Agent was "satisfied with the explanation that ultimately was produced by the taxpayer." (A-248)

Ultimately on February 1, 1974, more than three years later, an Information was filed charging the defendant with a two count violation of Section 7203, Internal Revenue Code, 26 U.S.C. §7203, in that he willfully and knowingly failed to make his income tax return for the years 1967 and 1968. The defendant waived his right to a trial by jury and the matter was brought on for trial on October 23, 1975. On May 19, 1976 a Judgment of Conviction on both counts was filed in the Office of the Clerk of the United States District Court for the Western District of New York.

POINT I

THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO A SPEEDY TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, THE SECOND CIRCUIT RULES AND THE WESTERN DISTRICT PLAN.

CHRONOLOGY OF RELEVANT DATES

April 22, 1969	-	Commencement of audit 1965-66 income tax returns.
September 24, 1969	-	Activity log entry by Revenue Agent Pardi granting one week extension to file 1967 and 1968 income tax returns. (A-372)
January 21, 1970	-	Actual filing of 1967 and 1968 income tax returns.
February 1, 1974	-	The filing of Information charging defendant with violation of Sections 7203, Internal Revenue Code (two counts).
April 22, 1974	-	Arraignment.
April 24, 1974	-	Filing of pretrial motions by defendant.
August 6, 1974	-	Letter from defense counsel advising Government that the delay was chargeable to the prosecution.
August 14, 1974	-	Filing of purported Statement of Readiness by Government. (A-16)
August 22, 1974	-	Letter from defense counsel to Judge Burke requesting that case be set for immediate trial. (A-17,18)
May 12, 1975	-	Defendant filed Motion to Dismiss Information. (A-21)

May 15, 1975 - Submission of Motion to Dismiss for Decision. Letter to Judge Burke requesting trial at the earliest available date. (A-34,35)

October 20, 1975 - Decision and Order of Judge Burke denying, in part, defendant's pretrial Motion for Discovery and Inspection, Bill of Particulars, etc. and denying defendant's Motion to Dismiss Information. (A-42,43,44)

October 23, 1975 - Trial.

PRE - PROSECUTION DELAY

It is uncontroverted that, at least as early as September, 1969, the Government was aware that the defendant, Joseph C. Vispi, had not yet filed his 1967-68 income tax returns. This awareness is reflected by the entry on September 24, 1969 in the activity log of Revenue Agent Pardi. (A-372)

The criminal investigation by the Intelligence Division of the Internal Revenue Service terminated in November, 1970. During the course of this investigation, Mr. Vispi was required to be present at numerous interviews, and to produce many of his documents. Unquestionably, his delinquency in filing was known to the Government. It is conceded that he was the "target" of a criminal investigation. (A-199)

Nevertheless, formal charges were not placed against Mr. Vispi until the filing of an Information on February 1, 1974, more than six and one-half and seven and one-half years after the alleged commission of the respected offenses and on the eve of the expiration of the statute of limitation. His trial was not conducted until October 23, 1975.

On May 12, 1975, defendant filed a motion to dismiss the Information on the ground, inter alia, that he had been deprived of his right to a speedy trial because of the delay between the

alleged commission of the offense, filing of the Information and the trial of the action. (A-21)

On October 17, 1975, this motion was denied by Judge Burke.

This pre-prosecution delay constituted a deprivation of Mr. Vispi's right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States. Furthermore, the unreasonable and oppressive delay caused him actual prejudice in connection with his defense of these charges resulting in a denial of due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The leading case on pre-prosecution delay and the constitutional guarantee of a speedy trial is United States v. Marion, 404 U.S. 307 (1971). The issue presented for review was whether dismissal of a federal indictment was constitutionally required by reason of a period of three years between the occurrence of the alleged criminal acts and the filing of the indictment. The Court held that "[i]n our view, however, the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused,' ..." (emphasis supplied).

"To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act, that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his association, subject him to public obloquy, and create anxiety in him, his family and his friends." Marion, Id. at 320.

The Court declined to fully define the extent of the reach of the Sixth Amendment but made it clear that "invocation of the speedy trial provision thus need not await indictment, information, or other formal charge." Marion, Id. at 321.

The most recent pronouncement of the Supreme Court in this area came in Dillingham v. United States, 423 U.S. 64 (1975). The Supreme Court reversed and remanded a decision of the Court of Appeals for the Fifth Circuit which held that under United States v. Marion, supra, a 22 month pre-indictment delay is not to be counted for purpose of a Sixth Amendment motion, absent a showing of actual prejudice. The Court bluntly characterized this reading of Marion as "incorrect." Marion dealt with delay between the end of the criminal scheme charged and the indictment of a subject not arrested or otherwise charged previous to the indictment.

Dillingham is the "precedent" which was contemplated by Chief Judge Friendly in United States v. Briggs, 457 F.2d 908, 911

2d Cir. 1968), cert denied 394 U.S. 989 (1969), that requires a re-evaluation of United States v. Capaldo, 402 F. 2d 821 (2d Cir. 1968) cert. denied, 394 U.S. 989 (1969); United States v. Feinberg, 382 F.2d 60 (2d Cir. 1967); United States v. Hammond, 360 F. 2d 688 (2d Cir. 1966); United States v. Dickerson, 347 F.2d 783 (2d Cir. 1965), and similar cases that reflected a hesitancy to extend a speedy trial guarantee to the post information stage.

The significance of Dillingham, supra, is apparent. Once the pututive defendant becomes, in some way, an accused, he is entitled to the constitutional guarantee of a speedy trial. A deprivation of this right can exist absent a showing of actual prejudice.

In September, 1969, the Intelligence Division of the Internal Revenue Service commenced their criminal investigation of Mr. Vispi. There can be no argument that he was the sole target of the investigation. (A-199) During the course of the investigation he was required to attend various "conferences" with Special Criminal Agents. These conferences were preceeded by an abbreviated recitation of his Miranda rights. He was required to produce many of his business records. He was interrogated concerning his reasons for failure to file his income tax returns 1967-1968. The significant restraints of liberty that these conferences placed on Mr. Vispi constituted arrest within the traditional definition of that term and he became "...in some way, an accused..." within the meaning of Marion, supra.

Furthermore, at the termination of the criminal investigation by the Intelligence Division of the Internal Revenue Service in October, 1970, the Government either had probable cause to legally arrest defendant or they did not. There was no subsequent investigation by the Government and no additional evidence relative to the prosecution was uncovered.

Nevertheless, it was not until February, 1974, more than seven and one-half and six and one-half years after the alleged commission of the respective offenses more than four (4) years after the Revenue Agent became aware that the returns were not filed and more than three (3) years after the termination of the criminal investigation that he was formally charged with a criminal offense.

This delay cannot be attributed to the right of law enforcement officers to "strengthen their case by ferreting out further evidence or discovering and identifying confederates and collaborators." Carlo v. United States, 286 F.2d 841 (2d Cir. 1961). The Revenue Agents did not need "more time to complete their investigation" as in United States v. Dickerson, 347 F.2d 783 (2d Cir. 1965).

Beckwith v. United States, U. S. , 48 L.Ed. 2d 1, 96 S. Ct. (1976) notwithstanding, we urge the adoption of the approach

recommended Justice Douglas in his concurring opinion in Marion, supra, at 333.

> "We were not then concerned with whether an "arrest" or an "indictment" was necessary for a person to be an "accused" and thus entitled to Sixth Amendment protections. We looked instead to the nature of the event and its effect on the rights involved. We applied the Miranda rule even though there was no "arrest," but only an examination of the suspect while he was in his bed at his boarding house, the presence of the officers making him "in custody." Orozco v. Texas, 394 U.S. 324, 327. We should follow the same approach here and hold that the right to a speedy trial is denied if there were years of unexplained and inexcusable pre-indictment delay."

In addition to the denial of defendant's right to a speedy trial, the pre-prosecution delay caused him actual prejudice and impaired his capacity to prepare his defense, thus depriving him of due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The impairment of the ability of Mr. Vispi to defend against these charges became acute due to the delay of the Government in filing the Information. His personal recollection and ability to document events during the year 1967-1968 became blurred, due to the passage of time. His recollection of the all important conversation between himself and Revenue Agent Pardi, on April 22, 1969 which the Government argues is an element of willfulness, had to overcome the contemporaneously recorded memorandum of a criminal agent seeking a conviction.

It is true that Mr. Vispi testified that he did not tell Agent Pardi on that date that he had already filed his 1967-68 returns but his ability to corroborate and document his testimony was impaired. The demise of Special Agent Francis in 1972 deprived him of a potential exculpatory witness on the crucial issue of willfulness. Therefore, the reliability of the proceedings for determining his guilt or innocence became suspect. United States v. Feinberg, supra, at 66.

Meanwhile, during pre-indictment delay the Government proceeded to methodically manufacture their case against Mr. Vispi with the assistance of all his records and the memoranda of his interviews and detailed activity logs of their agents, the Government commenced the prosecution against Mr. Vispi, a sole practitioner with a history of negligent record keeping. Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965) reversed a conviction for a narcotics violation on the ground that the defendant was denied due process where the complaint against him was not sworn out until seven months after the alleged offense and the prosecution's case consisted solely of policeman's testimony from a recollection refreshed by reference to his contemporaneous entries in a notebook. The Court citing Nickens v. United States, 323 F. 2d 808, (D.C. Cir. 1968) embraced the concept that the statute of limitations is not the sole standard by which delay between the offense and the complaint is to be measured.

"Though prejudice is not to be presumed, it may well be that pre-arrest delay may impair the capacity of the accused to prepare his defense and, if so, such impairment may raise a due process claim under the Fifth Amendment, See Powell v. United States, 122 U.S. App. D.C. 229, 352 F.2d 705, 707 (1965), or a Sixth Amendment claim based upon the speedy trial guarantee, See United States v. Simmons, supra, 338 F.2d at 806; United States v. Dickerson, supra, 347 F.2d at 784. See also Chapman v. United States, 376 F.2d 705 (2 Cir. 1967)." United States v. Feinberg, supra, at 65.

POST INFORMATION DELAY

The calculus provided in Barker v. Wingo, 407 U.S. 514 (1974) identifies four factors which courts should assess in determining whether a particular defendant has been deprived of his right to a speedy trial.

Length of Delay:

The length of delay acts as a triggering mechanism which activates the Sixth Amendment rights of a defendant. The length of delay between the filing of the Information and the trial of this action was in excess of twenty (20) months. A delay of this duration in the prosecution of a simple misdemeanor two count Information alleging failure to file income tax returns for the years 1967-68 is unreasonable and unnecessary. The nature of this prosecution is neither detailed nor complex.

Other circuits have held that a delay of more than one year between arrest and trial gives prima facie merit to a Sixth Amendment challenge. United States v. West, 504 F.2d 253 (D.C. Cir. 1974). United States v. Fay, 505 F.2d 1037 (1st Cir. 1974) found that the defendant's right to speedy trial was violated where the defendant did not contribute to a nine (9) month delay between the third date set for trial and the date of the trial. The delay apparently stemmed from the inability of the Judge to

to hear the case. In United States v. Calloway, 505 F.2d 311 (D.C. Cir. 1974), a delay of fifteen (15) months between arrest and trial constituted a deprivation of the right of the defendant to a speedy trial. In United States v. Latimer, 511 F.2d 498 (10th Cir. 1975), the Court found that a delay of eleven (11) months raised a substantial and serious question of the denial of the defendant's right to a speedy trial and the Court was required to inquire into the circumstances, prejudice to the defendant and his assertion of that right as well as any other factors that must be weighed. This Circuit has found post-indictment delays of sixteen (16) months and more than twenty (20) months unreasonable, United States v. Roberts, 515 F. 2d 642 (2d Cir. 1975), United States v. Favaloro, 493 F. 2d 623 (2d Cir. 1974).

Reason for Delay:

In their opposition to the Motion to Dismiss below, the Government merely stated that:

> "[u]nder the tests set out in Barker v. Wingo, 407 U.S. 514 (1972), the post-Information delay in this case is so small that there is no cause whatsoever for dismissal of the Information under the Sixth Amendment." See Record on Appeal No. 12.

The Government does not allege that any witness was unavailable, nor a need for additional time to prepare the

prosecution, or even that the court docket was congested. No explanation is proffered to justify the delay of the trial which reached fifteen (15) months as of the date of the defendant's Motion to Dismiss and continued to total in excess of twenty (20) months before the matter was finally brought on for trial on October 23, 1975. The Government cannot take refuge in the failure of Judge Burke to decide the Discovery motion and the motion to dismiss because the prosecution made no effort to accelerate the trial of Mr. Vispi. Institutional delays are chargeable to the Government. United States v. Roberts, 515 F.2d 642, 647 (2d Cir. 1975); United States v. West, 504 F. 2d 253, 256(D.C. Cir. 1974. The delay in Roberts, supra, was not of the "governments 'active making' but it was very much dependent on the governments' studied inactivity insofar as moving the Smith cases toward trial." Roberts, Id. at p. 647. This factor was counted "heavily against the government." Roberts, Id. at p. 647.

Defendant Vispi neither consented nor contributed to the delay in the trial of his action.

Defendant's Assertion of His Right:

The route of this prosecution in the District Court is distinctly marked with evidence of the defendant's demand for speedy trial. On August 6, 1974, six months and five days after the filing of the Information in this action, the attorney

for the defendant wrote to the Assistant United States Attorney in charge of the prosecution and advised him that he considered the delay in the trial of this action chargeable against the Government. (A-29) The Assistant United States Attorney, who up to that point, had taken no action to file a Notice of Readiness or a Motion to Set a Trial Date, promptly filed his Notice of Readiness which was approximately six months and two weeks after the filing of the Information. Upon receipt of this Notice of Readiness, the attorney for the defendant immediately wrote Judge Burke, outlined the pending motions before him, and requested that the matter be set for trial. (A-30,31) This letter was written on August 22, 1974 and no further action was taken in connection with this matter until May 2, 1975, more than seven (7) months later, when the Government filed a Motion to Set a Date for Trial. It was at this point that the defendant moved to dismiss the Information on the ground, inter alia, that he had been denied his right to a speedy trial. (A-21) Authority in support of this motion was submitted three days later with a transmittal letter from the attorney for the defendant which requested a trial "at the earliest available date." (A-34,35) The trial was not commenced until five months later. This documented demand for a speedy trial at every stage of the prosecution is entitled to strong evidentiary weight in determining whether or not the defendant was deprived of his rights under the Sixth Amendment.

Prejudice to the Defendant:

The indefinite prolongation of a pending indictment is inherently prejudicial to a defendant. It may subject him to "public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." Klopfer v. North Carolina, 386 U.S. 213 (1966) The psychological, physical and financial stakes of a defendant in the prompt determination of the pending indictment are significant. U.S. v. Roberts, 515 F.2d 642 (2d Cir. 1975). The touchstone of the Sixth Amendment right to a speedy trial is the minimization of the anxiety and concern accompanying a public accusation as well as the obvious disadvantage by the restraints of his liberty and the imminent presence of the Sword of Damocles. U.S. v. Ewell, 383 U.S. 116, 120 (1966); Barker v. Wingo, 407 U.S. 514, 533 (1971). Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974)

Joseph C. Vispi is a private attorney whose livelihood depends primarily upon referrals from other attorneys. He searches title to real estate and prepares title opinions. His only other source of remuneration is his role as a Confidential Clerk for a Justice of the Supreme Court, Eighth Judicial District, Erie Coutny, New York. The pendency of an indictment severely impinges upon his ability to earn a living. Other lawyers are understandably

reluctant to refer title work to him and his position as Confidential Clerk to a Supreme Court Justice, which requires impeccable integrity, resides on the precipice of elimination.

In this regard, it should be noted that Mr. Vispi's adjusted gross income in 1967 reported on his amended returns was $??,359.55, 1968 - $31,356.20. (Exs. G-3,4,5,6) In 1970 the adjusted gross income reported for that year declined to $23,053.20 and in 1971,$15,110.50.

The speedy trial right was also designed to protect against the impairment of the presentation of the defense to criminal charges. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. Barker, supra, 532. In 1972 Special Agent Francis died. He commenced the criminal investigation of Mr. Vispi in order to ascertain whether or not Mr. Vispi willfully failed to file his income tax returns for the years 1967-68. This criminal agent in his original memorandum of interview, after an extensive interrogation of Mr. Vispi (A-366,367,368), found no affirmative evidence of willfulness. In this respect the experienced criminal agent's report differed from the trial testimony of the less experienced agent Pasquarella. (A-246-257) Such testimony from the deceased agent Francis on this issue would have been critical to the defense. In addition, Mr. Vispi was unable to recollect and/or document important facts which were relevant to his defense.

1. His applications for extensions in 1967 and 1968.

2. His inability to document his recollection of the conversation with Special Agent Pardi on April 22, 1969.

3. His inability to reconstruct the various office moves and loss of records that he encountered during the critical years.

It is speculation that an earlier Notice of Readiness or an earlier trial would have increased the mnemonic capacities of the defendant. This is not justification for dismissing his claims.

> "The building of a framework of procedural fairplay, like other constructions, rests to some degree upon probabilities, and the probabilities here are in favor of the shorter period." Ross v. United States, supra, at 213.

Violation of Rule 48(b):

Rule 48(b) of the Federal Rules of Criminal Procedure was designed to implement the right of an accused to a speedy trial under the Sixth Amendment. However, this section of the Federal Rules of Criminal Procedure is not entirely co-extensive with that right. The same factual pattern which establishes a lack of speedy trial under the Sixth Amendment would a fortiori demonstrate that there was unnecessary delay under Rule 48(b). However, the converse is not always true. Rule 48(b) imposes a more stringent standard than the Sixth Amendment, United States v. Cartano, 420 F.2d 362 (1st Cir. 1970). The rule is the primary tool in eliminating inexcusable delay in the prosecution of an action. Delays can be catagorized as unnecessary and proscribed by Rule 48(b) even though they are short of a constitutional violation. It is respectfully submitted that the prosecution of Joseph C. Vispi is a prime example of studied inaction on the part of the Government and is violative of Rule 48(b) of the Federal Rules of Criminal Procedure. The pretrial delay in connection with this case is clearly attributable to Government and/or the Court and such inaction is inexcusable. The defendant did not contribute to this delay and articulated his desire for an early trial via letter to the presiding judge and/or the prosecutor on three separate occasions. The denial of the Motion to Dismiss the

Information based upon a violation of Rule 48 was an abuse of discretion. Judge Burke made no findings of fact nor did the Government offer any plausible reason for the unneccessary pre-trial delay of more than twenty (20) months.

Violation of Second Circuit Rules and Prompt Disposition Plan of the Western District:

In January, 1971 the Second Circuit promulgated rules regarding the prompt disposition of criminal cases. These rules were amended in May, 1971. Rule 4 provides that the Government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried [other than a sealed indictment], whichever is earliest. The sanction for failure to comply with this rule is a dismissal of the charge. On February 20, 1973, the Judges of the United States District Court for the Western District of New York adopted a Plan for Achieving Prompt Disposition of Criminal Cases. This plan was effective April 1, 1973. Rule 4 of this plan is essentially congruent with the Second Circuit rules. However, the plan directs that any such motion shall be decided "with utmost promptness."

The denial of the Motion to Dismiss the Information below was error. The Government was not ready for trial within six months of the date of the filing of the Information. The Information

was filed on February 1, 1974. The Government filed its first Notice of Readiness on August 14, 1974, approximately fourteen (14) days past the six month deadline. In United States v. McDonough, 504 F.2d 67, 68 (2d Cir. 1974), it was held, citing United States v. Flores, 501 F. 2d 1356 (2d Cir. 1974) that "... there is no de minimus of time period under the six months' rule; the Government 'must be ready for trial within six months ...,' not six months and three days, four days, five days, or nine days." (or fourteen days).

This Notice of Readiness was not filed until the attorney for the defendant had advised the Government that he would consider any delay in the prosecution of this action chargeable to the Government. Approximately one week later the Government filed its Notice of Readiness. Since Judge Burke had not yet decided the defendant's Motion for Discovery and Inspection, etc., which was filed on April 24, 1974, the Government's initial Notice of Readiness was of no effect.

> "The Second Circuit has held that the six month Rule is satisfied, as here, even when the completion of Discovery followes the filing of a Notice of Readiness, as long as Discovery has been completed within the six month period." United States v. Gonzalez, 389 F. Supp. 471 (E.D.N.Y. 1975) citing United States v. Strayhorn, 471 F.2d 661, 667 (2d Cir. 1972).

After the filing of this purported Notice of Readiness, the Government took no further action to bring this case on for trial until May 12, 1975 when a motion was filed to set a trial date. It is apparent the Government was not ready for trial within six months from the filing of the Information and the filing of the first Notice of Readiness was meaningless. A similar question was raised in United States v. Pollak, 474 F.2d 828 (2d Cir. 1973). The Government maintained that it complied with the rule because it filed a Notice of Readiness on November 18, 1971, approximately five months subsequent to the filing of the indictment. However, the Government had not complied with a Discovery Order. The Court vacated the judgment and remanded for a hearing and specific findings concerning the period of delay that is provided for in Second Circuit Rule 5(H). The Court remarked "that there were remedies open to appellant to obtain compliance with the Discovery Order." These remedies were not available to the defendant, Vispi, since the Court had not decided the Motion for Discovery and Inspection, etc. at the time of the filing of the Notice of Readiness. The motion was filed on April 24, 1974 and the Notice of Readiness was filed approximately four months later. The motion was not decided until October 17, 1975. This is certainly an unreasonable delay for a decision on a pro forma discovery motion. United States v. Bowman, 595 F.2d 594 (2d Cir. 1974) requires the government to do more than merely file a Notice

of Readiness within six (6) months of defendant's arrest. They must "take whatever steps necessary to dispose of criminal cases rapidly." Favaloro, supra, at 625.

Furthermore, the filing of such Notice alone is not "dispositive regarding any future delays." United States v. Reingold, 384 F. Supp. 464, 466 (W.D.N.Y. 1974). The initial Notice of Readiness was filed on August 14, 1974, approximately two weeks after the expiration of the six month deadline, one week after a letter from the attorney for the defendant to the Government advising that the delay is chargeable to the Government. Upon receipt of the Statement of Readiness, attorney for the defendant promptly wrote to Judge Burke with carbon copies to the United States Attorney and the Assistant in charge of the prosecution requesting an immediate trial. (A-30,31) No further action was taken in connection with the prosecution of this matter until the filing of a Motion to Set a Trial Date approximately eight and one-half months later, on May 2, 1975.

The excuse offered by the Government below was that the discovery motion was sub judice. A delay of in excess of twenty (20) months to decide a pro forma motion for discovery and inspection is unreasonable and cannot be considered a period of delay in computing the time within which the Government must be ready for trial.

The Circuit Counsel in their Statement of the Circuit Counsel to accompany Second Circuit Rules regarding prompt disposition of criminal cases expressed their concern for unreasonable delays of this nature. "We further note that pretrial proceedings and trial of criminal cases, many of which have been pending in excess of one year, consume a disproportionate amount of the time of the courts, particularly in those cases which have been pending more than one year." 8B Moore's Federal Practice - Criminal Rules p. 48-15

This Circuit also spoke distinctly on the purpose of these rules.

> "In summary, the Rules are designed to require the government to be ready to try cases promptly, subject to certain types of delay generally recognized as arising from legitimate or unavoidable causes. The purpose of Rule 4 is to insure that regardless whether a defendant has been prejudiced in a given case or his constitutional rights have been infringed, the trial of the charge against him will go forward promptly instead of being frustrated by creeping, paralytic procedural delays of the type that have spawned a backlog of thousands of cases, with the public losing confidence in the courts and gaining the impression that federal criminal laws cannot be enforced." Hilbert v. Dooling, 476 F.2d 355 (2d Cir. 1973)

In Favaloro, supra, the judgment of the defendant was vacated and the indictment dismissed when the delay between arrest and readiness for trial was nearly two years.

> "More than twenty months of delay occurred after the new Untied States Attorney had taken office in the eastern district. It is precisely this kind of inordinate delay, with the resulting erosion of public confidence and respect for the process of law enforcement, that the Circuit Counsel hoped to overcome with the prompt disposition rules. See statement of the Circuit Counsel, supra, at 67. To hold that heavy caseloads or backlogs justify years of delay in proceeding to trial will thrust us back to the intolerable conditions which existed prior to the adoption of the rules." Favaloro, supra, at 625.

A further violation of the Western District Plan for Achieving Prompt Disposition of Criminal Cases can be found in the Court's treatment of the defendant's motion to dismiss for violation of Rule 4. This motion must be decided "with utmost promptness." W.D.N.Y. Plan, R. 4. Defendant Vispi's Motion to Dismiss Information was filed on May 12, 1975. Furthermore the decision did not contain any findings of fact capable of review.

Rule 9 of the Prompt Disposition Plan of the Western District of New York places the sole responsibility of the Court for setting and calling cases for trial. It is generally considered to be the responsibility of both the Government and the Court to bring criminal matters on for trial expeditiously. United States v. Hodges, 408 F. 2d 543.

551 (8th Cir. 1969), West, supra; Barker, supra at 529; Roberts, supra; Favaloro, supra.

The neglect of the Government to file a timely Statement of Readiness combined with the failure of the Court to determine the pretrial motions in a reasonable period of time constituted an abdication of their responsibility and a violation of the Second Circuit Rules and the Western District Plan.

POINT II

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A JUDGMENT OF CONVICTION.

Considered in a light most favorable to the Government, the quantum of evidence produced by the Government fails to prove, beyond a reasonable doubt, that the defendant willfully failed to file his 1967 and 1968 income tax returns. In 1973, the Supreme Court in United States v. Bishop, 412 U.S. 346 (1973) held that proof beyond a reasonable doubt of the bad purpose or evil motive described in United States v. Murdock, 290 U.S. 389 (1973) was required to sustain a conviction in both tax felonies and misdemeanors.

It is not sufficient to support a conviction to prove that a defendant was an attorney who knew he had to file a return and, in fact, the return was not timely filed. Attorneys have no special knowledge in this regards and there is no imputation of willfulness from the fact a return was not timely filed.

The 1968 Annual Report of the Commissioner of the Internal Revenue Service shows 770,587 delinquent returns and a combined total of only 830 criminal prosecutions of tax code violations, per se.

The question of willfulness in this case requires more than evidence of knowingly filing a return after the required date. There must, under Bishop, supra, and Murdock, supra, be more, i.e., evidence beyond a reasonable doubt of bad purpose or evil motive.

In this regard, not only the defendant but also his former law partners testified at length that the delinquency was occasioned by overwork, poor work habits, neglect and tardiness in everything he did. No willfulness or evil motive attached to Mr. Vispi's tardiness in handling the affairs of his clients nor was there ever any evidence presented of tax evasion or concealment on the part of Mr. Vispi. In fact, his tax errors were often to his detriment revealing a lack of sophistication in this area.

The former law partners and another attorney who regularly referred work to Mr. Vispi testified, without contradiction or impeachment, that the defendant's tardiness arose from good not evil intentions such as taking on too many inconsequential tasks for non-paying clients to the detriment of more remunerative clients. No attempt was made to rebut or discredit their testimony.

The evidence revealed that at the close of 1967, the law partners of the defendant dissolved their partnership and literally forced him to relocate. (A-310, et seq.). This

termination of a long-standing association was a traumatic experience for the defendant. Many of his records and the records of his clients were misplaced during the move or unavailable for the preparation of his income tax return. Within a matter of months, the defendant became embroiled in a lease squabble at his new location. (A-316). He was again required to move his office.

The former law partners of the defendant, James A. Garvey and Philip H. Magner, Jr., provided detailed evidence of the defendant's neglect, ineptness and delay in the handling of his affairs and the affairs of his clients.

The simple, plain and unfortunate truth of the position of Mr. Vispi was one of too much work (A-304, 338, 347), lack of organization (A-341) and inability, no matter how desperately he tried, to live up to his good intentions and to perform work for his clients and for himself in a timely fashion. (A- 304). William R. Brennan, an attorney who referred real estate matters to Mr. Vispi described his inability to get referral work done on time. (A-347).

Proof of criminal willfulness cannot be established by evidence of repeated neglect, gross negligence or untimely and unsuccessful efforts by a taxpayer to comply with the law. United States v. Rosenfield, 469 F.2d 598 (3d Cir. 1972). A

careless or reckless disregard does not elevate the conduct of a defendant to willful, as that term is employed in Section 7203. United States v. Bengimina, 199 F.2d 117 (8th Cir. 1974). "Mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by evil motive are not probative of willfulness." United States v. Palermo, 259 F.2d 870, (3d Cir. 1958).

There is not a scintilla of evidence to establish that the defendant ever intended to prevent the Government from getting what it lawfully required. United States v. Vitiello, 363 F.2d 240 (3d Cir. 1966).

In addition to the requisite, specific wrongful intent, the existence of that intent must be established as of the time the crime was allegedly committed, United States v. Palermo, 256 F.2d 872, 881 (3d Cir. 1958). The Government fails to make the required showing that the defendant's failure to timely file his income tax returns was a result of some bad intent, eg., intent to conceal taxable income from Government, United States v. Rosenfield, supra; United States v. Platt, 435 F.2d 789 (2d Cir. 1970); United States v. Marquez, 332 F.2d 162 (2d Cir. 1964), cert. denied 379 U.S. 890 (1964).

An indication of the lack of the necessary evidence of willfulness was the trial court's refusal to accept the

Government's proposed findings of fact. "That the defendant herein, Joseph C. Vispi, willfully failed to file said required timely income tax returns." (A-352). Instead, the court, without any supporting factual findings, found "[t]he defendant with guilty knowledge failed to file the required income tax returns for 1967 and 1968 within the period required by law as charged in the information." (A-358). This finding was insufficient factually and legally to support a judgment of conviction.

At the conclusion of the trial, Judge Burke requested that both parties submit proposed findings of fact together with any post trial memorandum of law that they desired.

> When a trial judge recognizes the need for findings of fact in a criminal prosecution and directs that they be prepared by the prosecutor for the approval of the trial court, it is unnecessary for counsel to request that special findings of fact be made. United States v. Snow, 484 F.2d 811 (D.C. Cir. 1973).

However, the Decision of Judge Burke (A-357) does not reflect appropriate special findings to support a Judgment of Conviction. The lack of special findings takes on special significance when viewed in conjunction with the events on the second day of trial.

A luncheon recess was taken at approximately 12:45 p.m. Judge Burke instructed all parties to be present and prepare to proceed at 2:00 p.m. Counsel for both sides and the stenographer

promptly appeared at Court to continue the trial of this action at 2:00 p.m. The designated hour for the resumption of the trial came and passed. All parties were advised by the Assistant United States Attorney in charge of the prosecution that the Court staff was concerned about the judge because he had gone to lunch alone and they had not heard from him. It was not until 2:45 p.m. that the judge returned from lunch and his ascendency to the bench was with apparent difficulty. There was no explanation for his late arrival and the trial resumed.

The first witness was James A. Garvey, Esq., a witness for the defense, and he gave testimony concerning his partnership in the practice of law with the defendant during the years in question. Judge Burke sat motionless during the course of his testimony with his eyes closed. The witness became cognizant of the judge's inattention and attempted to remedy this by raising his voice and changing his inflection. The manner of questioning was changed in order to invoke some response from the judge. Both efforts were unsuccessful.

Following the testimony of Mr. Garvey, the defendant, Joseph C. Vispi, took the stand. After some introductory questions, the same pattern was repeated. The judge sat motionless with his eyes closed. The defense attorney ceased for a brief period, to

question the witness in an effort to attract the judge's attention. This was largely unsuccessful. A recess was requested by the defense counsel and the reason offered by counsel was totally inappropriate and manifestly inconsistent with the status of the proceeding. (A-318) The Court granted the recess.

Following the recess, the same pattern was repeated. There were occasional moments of attention, particularly at the commencement of questioning and upon any objection of counsel. During the recess defense counsel requested Mr. Garvey to remain in the court room as an observer. At the conclusion of the testimony of the defendant, the defense called Philip H. Magner, Jr., a former law partner of the defendant during the years in question. After a brief introduction of the witness, Judge Burke resumed the pattern. During the course of Mr. Magner's testimony, the inattention of the judge prompted him to commence coughing and to request a glass of water in an effort to arouse Judge Burke for the balance of his testimony. This is reflected in the transcript at A-338 as (pause in the proceedings.)

This testimony was critical to the defense on the issue of willfulness. It lay in the very area where the Judges' subsequent findings were so critically lacking. The defendant himself testified in an effort to explain his inability to timely file his income tax

returns for the years 1967 and 1968. Messrs. Garvey and Magner offered exculpatory evidence concerning the dissolution of their law partnership and their prior experiences with the defendant.

In retrospect perhaps counsel should have moved for a continuance or mistrial but such action in an non-jury criminal trial was not without substantial risk. Furthermore, clear precedent to support such an attack regarding the Judge's condition and conduct is not readily available. In any event, on balance after conferring with counsel for the Government and Chief Judge Curtin, it was felt that the matter did not warrant a post trial motion and that upon a non-jury trial a careful review of the transcript by the trial jduge would remedy the situation. However, the subsequent absence of factual findings now indicates that perhaps the trial judge has never properly weighed this important testimony. Under such circumstances the absence of adequate detailed findings and the conduct of the Judge is plain error within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure, and also explains the judgment of conviction not withstanding insufficient evidence of evil motive and bad purpose required for a finding of willful failure to file the returns on time.

CONCLUSION

The Judgment of Conviction of Joseph C. Vispi on two counts of failure to file income tax returns for the years 1967-68 in violation of Section 7203, Internal Revenue Code, 26 U.S.C. Section 7203 should be reversed and the Information dismissed on the following grounds:

1. The defendant was denied his right to a speedy trial in violation of the Sixth Amendment to the Constitution of the United States.

2. Defendant was deprived of due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. The evidence of willfulness was insufficient to sustain a conviction under Section 7203, Internal Revenue Code, 26 U.S.C. Section 7203.

Dated: July 16, 1976

Respectfully submitted,

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ADDENDUM

Rule 48.

DISMISSAL

(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, of if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

SECOND CIRCUIT RULES REGARDING
PROMPT DISPOSITION OF CRIMINAL CASES

4. In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

5. In computing the time within which the government should be ready for trial under rules 3 and 4 the following periods should be excluded:

(a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pretrial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

WESTERN DISTRICT OF NEW YORK
PLAN FOR ACHIEVING PROMPT DISPOSITION
OF CRIMINAL CASES

4. All Cases : Trial Readiness and Effect of Non-Compliance.

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the

government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

Affidavit of Service

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Johnson D. Hay/Publisher
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The Daily Record

July 16, 1976

Re: United States of America v Joseph C. Vispi

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Ohlin, Damon, Morey, Sawyer and Moot

Attorney(s) for

Appellant

On July 16, 1976
(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

Richard J. Arcara, Esq.
United States Attorney in and for
the Western District of New York
233 United States Courthouse
Rochester, New York 14614
by Eugene Welch, Esq.
Assistant United States Attorney

☐ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

☒ By hand delivery

.....John D. Hay.....

Sworn to before me this 16th day of July 1976

.....John D. Hay.....
~~Notary Public~~
Commissioner of Deeds